No. 88-1637

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

STEPHEN DALSHEIM, Superintendent of Downstate Correctional Facility; ROBERT ABRAMS, New York State Attorney General; JOHN J. SANTUCCI, Queens County District Attorney,

Petitioners,

against

JAMES INNES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

Whether the state denied the accused his right to due process by enforcement of the outer limits of a plea bargain because of his breach of the plea agreement rather than permitting him to withdraw his plea of guilty or to have the lower agreed upon sentence imposed as if he had kept his end of the plea bargain?

Whether the federal Court of Appeals imposed a greater standard of insuring the constitutional rights of the accused in state criminal proceedings than what would be required in federal proceedings?

PARTIES

The parties to the matter are James Innes; Stephen Dalsheim, Superintendent of Downstate Correctional Facility; Robert Abrams, New York State Attorney General; John J. Santucci, Queens County District Attorney.

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Nos.

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JAMES INNES,

Petitioner,

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STEPHEN DALSHEIM, Superindendent of Downstate Correctional Facility; ROBERT ABRAMS, New York State Attorney General; JOHN J. SANTUCCI, Queens County District Attorney.

Respondent-Appelants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The State of New York requests that this Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit granting James Innes' petition for a writ of habeas corpus. That judgment reversed an order of the United States District Court for the Eastern District of New York denying the application for a writ of habeas corpus.

Jurisdictional Statement

The judgment of the United States Court of Appeals was rendered on December 29, 1988. This Court's jurisdiction is invoked under 28 USC §1254(1).

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported in 864 F.2d 774. The opinion of the

United States District Court for the Eastern District of New York is reported in 680 F.Supp. 517. The opinions of the New York State courts are reported in 111 AD2d 356 *reversing on reargument* 107 AD2d 912 (2d Dept. 1985) *leave to appeal denied* 65 NY2 982. Each of these opinions is reproduced in the appendix to this petition.

Constitutional Provisions Involved

United States Constitution Fourteenth Amendment

Statement Of The Case

Plea Proceedings

Indicted for four separate robberies in Queens County, James Innes withdrew his not guilty pleas and entered four guilty pleas in exchange for a sentence of 4 1/2 to 9 years concurrent time on all charges. This court conditioned his remaining at liberty and the pleas on three provisions: that he appear for sentence, cooperate with probation authorities and "number three, most important, that you don't get re-arrested and charged with any other crimes or offenses". Mr. Innes asserted his understanding of the conditions, when the court stated:

> If you violate any of the conditions outlined by the Court, do you understand that you are facing the possibility of consecutive sentence totalling thirty to sixty years which would be the maximum sentence to be imposed on you under each one of these indictments as a second or predicate felon, you would owe seven and a half to fifteen—withdraw that, on the C felony, yes, it would be thirty to sixty years, you could face seven and a half to fifteen years consecutive sentence on each one of these; do you understand that?

The court questioned the defendant about his waiver of his right to a jury trial, to call witnesses and the like before examining him on the underlying charges. He admitted stealing money from

others on four separate occasions at gunpoint with a toy gun. The pleas were accepted and the defendant released to conclude his personal business before sentencing.

Sentence

At sentencing, the People advised the court of the negotiated plea; defense counsel adopted the People's statement and requested imposition of the 4 1/2 to 9 year sentence. The court recalled the three provisions it imposed when granting liberty to Mr. Innes and called attention to documentation from the District Court of Nassau County showing his arrest under four separate robbery charges, three of which occurred while he was at liberty between the instant pleas and sentence. The court stated that under the circumstances it did not feel bound to live up to its obligation to impose a 4 1/2 to 9 year sentence, noting that the plea "was a conditional plea and conditions have to be met by both sides. The Court promised to live up to it's (sic) condition and give the defendant four and a half to nine years, and leave him at liberty, but the defendant promised not to get rearrested and promised to show up for sentence". Finding a failure to keep the promise not to get rearrested, the court withdrew its promise to be bound to give the 4 1/2 to 9 years. It denied an application to withdraw the plea on grounds of an unfulfilled sentence promise and imposed consecutive terms of 7 1/2 to 15 years covering the four indictments. Counsel objected and, although conceding the fact of his client's arrests,[1] stated that he was presumed innocent at that juncture.

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[1] On February 21, 1985, James Innes entered guilty pleas to attempted robbery in the first degree in Nassau County Court under Indictments 59310 and 59704. He was sentenced to concurrent terms of 6 to 12 years as a second violent felony offender (Thorp, J.).

Post Judgment Proceedings

(1) Motion to Reduce Sentence

By motion to the Appellate Division of the Supreme Court, Second Department, Innes sought a reduction of sentence to 4 1/2 to 9 years; counsel argued that the court not only violated the plea negotiations and the promises but imposed excessive and oppressive sentences in violation of the defendant's right to due process. He asserted that the mere fact of arrests in Nassau County did not override the presumption of innocence and that the court had no right *sua sponte* to refuse to fulfill the promise. The People responded that although the sentence should not have been imposed as initially indicated, the defendant, under present understanding of case law, should have been permitted to withdraw his guilty plea. The Appellate Division reversed the convictions and remitted the case to the sentencing court for imposition of the promised sentence or withdrawal of the guilty pleas.

(2) Respondent's Motion for Reargument

The People sought reargument of the order of the Appellate Division on the grounds that it was inconsistent with a recent order of the same court affirming a defendant's conviction involving virtually the same facts and promises. In granting reargument, the Appellate Division reviewed the facts in light of its decision in similar cases and perceived no reason for reaching any different result in the case at bar. The reviewing court noted that the trial judge "made perfectly clear the terms of the plea bargain agreement, and the defendant, who had extensive prior experiences in the criminal justice system, manifested his acceptance of those terms". Leave to appeal the affirmance of the convictions was denied.

(3) Writ of Habeas Corpus

Innes sought federal habeas relief in the Eastern District of New York, contending that he should have been permitted to withdraw his plea and that his sentence promise of 4 1/2 to 9 years

should be enforced. He asserted that conditioning the sentence on his not getting arrested violated his right to due process and the presumption of innocence.

In a memorandum and order, Judge Nickerson found no constitutional infirmity in the "no arrest proviso" of the plea agreement and rejected the argument that the arrest was a matter not within the petitioner's control. Since the sentencing court did not mean malicious or otherwise baseless arrests, and the petitioner made no claim that they were so, there was no basis for declaring the condition invalid, especially in view of the pleas to the Nassau County charges. Judge Nickerson found no infringement on the presumption of innocence in imposing the sentence since a court may take into account a variety of factors in meting out punishment; the court also discerned no constitutional deprivation in denying the application for a withdrawal of the guilty plea lest the petitioner derive undue benefits from his breach of the plea agreement.

(4) Decision of the United States Court of Appeals Reversing The Order of the District Court

The reversing court noted that under *Santobello* v. *New York*, 404 US 257, (1971) a defendant may not be held to his negotiated plea of guilty when the promises upon which it was based remain unperformed by the prosecution. The rule also applies to a situation in which the defendant has breached the plea agreement. There the relief afforded the government includes release from its promises under the plea agreement and the right to proceed against the defendant without reference to its earlier promises.

In assessing a plea agreement it must be demonstrated that the defendant knowingly and intelligently waived his fundamental rights with an understanding of the consequences. The Court of Appeals, upon review of the conditions of the agreement between

the trial court and Mr. Innes, declared the language of the trial court ambiguous. The language reads:

> If you violate any of the conditions outlined by the Court, do you understand that you are facing the possibility of consecutive sentence totalling thirty to sixty years which would be the maximum sentence to be imposed by you under each one of these indictments as a second or predicate felon, you would owe seven and half to fifteen—withdraw that—on the C felony, yes, it would be thirty to sixty years, you could face seven and a half to fifteen years consecutive sentence on each one of these; do you understand that?

It found ambiguities in what the trial court said and what it failed to say inasmuch as Innes was told only that he faced the possibility of an increased sentence, upon his breach of a condition, but that he was not told that there would be no allowance for withdrawal of his plea should there be a breach. Most significant, the Court of Appeals noted that Mr. Innes was not told that were there a breach, the trial court could and would unilaterally impose an enhanced sentence. The Court of Appeals held that the state trial court should have explained with greater clarity the consequences of a breach. As worded, the trial court's discussion was ambiguous.

The court held that the plea was impaired because its consensual character was brought into question, and that Mr. Innes raised sufficient doubt as to whether his plea was ever accepted; and even if it was, whether he was fairly apprised of its consequences. In reversing, the appeals court held that under the plea agreement it could not be safely said that Innes voluntariily, knowingly and intelligently waived his right to a jury trial; and in particular, it was impossible to conclude that he truly understood that he was agreeing to waive his right to be tried on the charges but instead agreed that were he rearrested, he would be subject to imposition of a more severe sentence. Accordingly, the State of New York denied Innes his right to trial by jury, and in so doing,

denied him due process of law. A dissenting justice held that Innes should be permitted to withdraw his guilty plea.

POINT ONE

THE DECISION OF THE COURT BELOW APPLIES A STRICTER CONSTITUTIONAL STANDARD OF DUE PROCESS TO THE COURTS OF NEW YORK STATE THAN WOULD BE REQUIRED OF FEDERAL COURTS.

May a court hold an accused who breaches his part of a plea bargain to the express consequences of the breach and, if so, should the accused's awareness of the consequences of his breach be measured by an objective or subjective standard? In resolving this issue, the United States Court of Appeals applied a subjective test and invalidated the enforcement of a guilty plea against the defendant.

A conviction based upon a defendant's plea of guilty will be sustained when the record shows that the plea was voluntarily and intelligently entered. An accused's plea is usually deemed intelligent when he is aware of its consequences in terms of the maximum sentence which he is subject to. If he is confronted with unbargained for, unknown, or unforeseeable consequences of the plea when sentenced, he is entitled to specific performance of his agreement or to withdraw his guilty plea. Although no plea bargaining process can be found flawless, the plea agreement should withstand constitutional scrutiny if it can be clearly demonstrated that the one pleading guilty was fully aware of the direct consequences of his act.

On this score, it is only necessary, assuming voluntariness, that he be aware of the minimum and maximum penal exposure upon disposition of his case. *Santobello* v. *New York, supra* 404 US 261-262, 92 S.Ct. 433 recognized the contractual nature of the plea bargain in holding that a valid plea must be ". . . voluntary and knowing and if it was induced by promises, the essence of

these promises must in some way be made known" to the accused. As long as a defendant is aware of the possibilities of an increased sentence, a trial court may act without affording a defendant the right to withdraw his guilty plea. See, *United States* v. *Berrios*, __F.2d__ (2d Cir. 1989), citing *Innes* v. *Dalsheim, supra.* In *Brady* v. *United States*, 397 US 742, 90 S.Ct. 1463 (1970) a guilty plea was found intelligently entered even though the defendant claimed surprise. There due process was not offended since the defendant was fully apprised of the consequences. See, also, *Mabry* v. *Johnson*, 467 US 504, 509, 104 S. Ct. 2543, 2547 (1984). Similarly, the Fourth Circuit denied habeas relief to a petitioner who claimed that his plea was invalid because he did not understand its consequences. That court, in *Wade* v. *Conner*, 468 F.2d 1059, 1061 (1972), held that a catechism of the rights waived by entry of a guilty plea is not compelled by either the Constitution or by Rule 11 of the Federal Rules of Criminal Procedure. Indeed, under federal law, as long as a defendant is aware of the maximum possible extent of his sentence, he cannot seek to avoid his plea should a sentence greater than that which he or the prosecutor contemplated be actually imposed. *United States* v. *Babineau*, 795 F.2d 518 (5th Cir. 1986); *United States* v. *Usher*, 703 F.2d 956, 959 (6th Cir. 1983).

Applying these common principles of law, Mr. Innes' plea should not have been voided since the record spells out the minimum term he would receive upon his compliance with the terms of the plea bargain as well as his maximum exposure upon breach of any of its three material conditions. *Boykin* v. *Alabama*, 395 US 238, 89 S.Ct 1709 (1969); *Barbee* v. *Ruth*, 678 F2 634, 635 (2d Cir. 1982) *cert. denied*, 459 US 867; *United States ex rel. Robinson* v. *Israel*, 603 F.2d 635, 638 (7 Cir. 1979).

The subject decision nonetheless invalidated the plea by finding certain language ambiguous in that the trial court did not say that it would actually give Innes an enhanced sentence if he breached the conditions. Nor did the court inform him that the

plea could not be withdrawn or that a more severe sentence would be imposed unilaterally. The reviewing court revisited the plea agreement and declared that it did not show that the defendant bargained to be summarily sentenced upon his violation of an agreed upon condition. In fact, as the United States District Court as well as the New York State courts found, the defendant was sentenced according to the clear express terms of the agreement. As spoken by the plea court, the words conveyed to the defendant the fact that if he violated any of the conditions imposed, he would then be vulnerable to an enhanced sentence. See, *Ricketts* v. *Adamson*, 483 US 1, 107 S. Ct. 2860, 2865 (1987); *United States* v. *Ataya*, 864 F.2d 1324, 1334 (7th Cir. 1332).

By adopting the accused's position, the Second Circuit Court of Appeals applied a subjective standard for interpreting the plea agreement. This standard disregards the long standing principle of assessing the intent and reasonable expectations of the parties when construing the import of an agreement. *United States* v. *Ocasio-Gonzalez*, 840 F.2d 1022, 1028 (1st Cir. 1987); *United States* v. *Fields*, 766 F.2d 1161, 1168 (7 Cir. 1985). The issue is not what a defendant may have surmised or done after the fact, but whether or not, had he been possessed of the information beforehand, he would still have pleaded guilty. *Hunter* v. *Fogg*, 616 F.2d 55, 58 (2nd Cir. 1980). Instead of focusing on the reasonable expectations of the parties, the United States Court of Appeals reached results, by a strained interpretation, that the defendant could not nor should not have ascertained from the plea court's admonition. Extended to a logical extreme, this approach leads to the undesirable effect of undermining all pleas taken in state courts. It would truly be implausible to expect a court to set forth the consequences for a breach of plea conditions and then let a defendant breach without consequence. State court judges will be unfairly hampered in their efforts to bring to fruition plea bargaining agreements, because the decision of the Court of Appeals permits a defendant to abrogate such agreements with impunity

with the only result a return to the status quo ante. Ratification of the Second Circuit's treatment of this case would let a defendant negate a plea agreement by the simple expedient of breaching its conditions and thus emasculate the finality of the plea bargain process while achieving a windfall for himself. *United States* v. *McGovern*, 822 F.2d 739, 747 (8 Cir. 1987); *United States* v. *Baldachino*, 762 F.2d 170, 179 (1st Cir. 1985). Due process does not encompass safeguards to one who would profit from his misconduct, especially by the insertion of contigencies never considered by the parties. *United States* v. *Benchimol*, 471 US 453, 455, 105 S.Ct. 2103, 2105 (1985); *United States* v. *Reardon*, 787 F.2d 5, 12 (10 Cir. 1986).

The Second Circuit's decision, rendered without benefit of a hearing on the intent of the parties, would also allow recision of a plea agreement and avoidance of its terms simply through acceptance of a defendant's disagreement on the meaning of plain language. This falls far short of decisional law requiring the one contesting his conviction upon a guilty plea to demonstrate that he could not foresee the sentencing possibilities he was exposed to. Here, the Second Circuit virtually invents, without any basis in the record, an inability on the part of the defendant to understand the plain import of the court's words. Such a position renders the role of counsel meaningless and paves the way to upset virtually any plea on collateral attack because of a defendant's purported inability to comprehend the significance of the conditions and obligations bargained for. See, *United States ex rel. Curtis* v. *Zelker*, 466 F.2d 1092, 1098 (2d Cir. 1978).

Finally, the decision, if left standing, would place requirements on state trial courts which the Constitution does not require. See, *McMillan* v. *Pennsylvania*, __US__, 106 S. Ct. 2411, 2415 (1986). Because Mr. Innes was fairly apprised of the consequences of his breach of the plea, the Second Circuit determination places on state courts a burden not shared by their brethren in the federal courts, and opens up a Pandora's box of semantic

debate in disregard of the common sense import of plain language. *United States* v. *Harvey*, 791 F.2d 294, 300 (4 Cir. 1986) (unambiguous contract should be interpreted and enforced); *United States* v. *Gonzalez Sanchez*, 825 F.2d 572, (1st Cir. 1987) (trial court spelled out consequences of breach and enforced bargain accordingly). Whether applying either civil contract law precepts to criminal plea bargains or a reasonable expectations standard, it is clear that this decision strays from a constitutional and legal path by demanding more from the parties than they sought from each other. The decision reflects a standard of review which does not appropriately interpret the Constitution. And, because the record shows no constitutional infirmity underlying the State of New York's deprivation of Mr. Innes' liberty, the Second Circuit Court of Appeals improvidently overruled the lower court's decision denying his application for a writ of habeas corpus. *Mabry* v. *Johnson*, *supra* 467 US 507-508, 104 Ct 2546; *Townsend* v. *Sain*, 372 US 293, 311-312, 83 S.Ct. 745, 756 (1963).

Conclusion

For the foregoing reasons, a petition for certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

JOHN J. SANTUCCI
District Attorney
Queens County

GARY S. FIDEL
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Assistant District Attorneys
of Counsel

March, 1989

APPENDIX

Decision of the United States Court of Appeals for the Second Circuit December 29, 1986

James INNES, Plaintiff-Appellant,

v.

Stephen DALSHEIM, Superintendent of Downstate Correctional Facility, Robert Abrams, New York State Attorney General, John Santucci, Queens Court District Attorney, Defendants-Appellees.

No. 187, Docket 88-2109.

United States Court of Appeals,
Second Circuit.

Argued Oct. 19, 1988.

Decided Dec. 29, 1988.

Petition was brought for writ of habeas corpus. The United States District Court for the Eastern District of New York, 680 F.Supp. 517, Eugene H. Nickerson, J., denied the petition and defendant appealed. The Court of Appeals, Cardamone, Circuit Judge, held that defendant was not clearly informed of consequences of breach of plea agreement, rendering trial court's denial of his motion to withdraw plea violative of due process.

Reversed and remanded.

Van Graafeiland, Circuit Judge, dissented and filed opinion.

Appellant James Innes appeals from a February 23, 1988 order of the United States District Court for the Eastern District of New York (Nickerson, J.), 680 F.Supp. 517, denying his application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Reversed and remanded with directions to issue the writ.

Judge Van Graafeiland dissents in a separate opinion.

Jonathan Silbermann, New York City, for plaintiff-appellant.

Michael O'Brien, Asst. Dist. Atty., Queens County, Kew Gardens, N.Y. (John J. Santucci, Dist. Atty., of counsel, Kew Gardens, N.Y.), for defendants-appellees.

Before VAN GRAAFEILAND, CARDAMONE and PIERCE, Circuit Judges.

CARDAMONE, Circuit Judge:

This appeal is from a judgment of the United States District Court for the Eastern District of New York (Nickerson, J.) entered February 22, 1988 denying appellant James Innes' application for a writ of habeas corpus. The petition for habeas relief arose from a dispute concerning the effect of appellant's plea bargain in New York State Supreme Court. It is widely recognized that whether an individual plea agreement is a good bargain is an open question; that the process of plea bargaining is essential to the administration of the criminal justice system, however, is no longer open to question. On this appeal, we must decide whether appellant's plea agreement was one to which appellees may insist that he adhere.

I. PRIOR LEGAL PROCEEDINGS

Appellant was indicted on four separate counts of robbery in the first degree committed in 1983 in Queens County, New York. In exchange for concurrent sentences of four and one-half to nine years imprisonment, Innes withdrew his not guilty plea and entered a plea of guilty to four counts of robbery in the second degree in New York State Supreme Court, Queens County. At the plea proceeding, the state trial judge asked Innes whether he had discussed the charges with counsel, and whether he understood them and the sentence that would be imposed under the plea arrangement. The following colloquy between the court and appellant occurred:

THE COURT: Have any promises been made except the following promise to induce you to plead guilty to the charge, the

first thing you are going to remain at liberty pending sentence, secondly, you come back for sentence, your sentence will be four and a half to nine years as a maximum, in other words it will be a concurrent sentence, if you owe any parole violation time as a matter of law that parole violation time must be in addition to the sentence to be imposed upon you by this Court, do you understand that?

THE DEFENDANT: Yes . . . .

THE COURT: Do you further understand this Court is conditioning your remainig [sic] at liberty and the pleas in this case on the following, number one, that you show up for sentence, number two, that you cooperate with probation, number three, most important, that you don't get re-arrested and charged with any other crimes or offenses; do you understand that?

THE DEFENDANT: Yes.

THE COURT: If you violate any of the conditions outlined by the Court, do you understand that you are facing the possibility of consecutive sentence totalling thirty to sixty years which would be the maximum sentence to be imposed by you under each one of these indictments as a second or predicate felon, you would owe seven and a half to fifteen—withdraw that, on the C felony, yes, it would be thirty to sixty years, you could face seven and a half to fifteen years consecutive sentence on each one of these; do you understand that?

THE DEFENDANT: Yes.

The trial court judge then carefully explained to Innes that his plea of guilty waived his privilege against self-incrimination, his right to a jury trial and his right to call upon and confront witnesses.

Two months later, Innes appeared before the same state court judge for sentencing. The court noted that while at liberty during the interim between the plea hearing and the date of sen-

tencing, appellant had been arrested in Nassau County, New York on three robbery charges. The trial court then ruled that the plea agreement had been breached, and that it was not required to impose a reduced sentence, stating

THE COURT: . . .[P]art of the provisions of the Court's promise is that the defendant would be left at liberty and the Court made three conditions in addition to the fact that the Court would live up to this promise and the three conditions were that the defendant would show up for sentence, he would cooperate with probation and not get rearrested. It is my understanding, sir, and I have documentation here from the District Court in Nassau County, that your client was arrested and charged with four separate robbery charges, three of which occurred while the defendant was at liberty between the time the Court took the plea and the time sentence was to be imposed .... Under those circumstances this Court does not feel bound to live up to it's [sic] obligation as the promise made by the Court to the defendant to give him four and a half to nine years sentence.

Defense counsel immediately moved to withdraw Innes' guilty plea. The court summarily denied that motion, and proceeded instead to impose two consecutive terms of seven and a half to 15 years—or a total sentence of 15 to 30 years—covering the four indictments. Counsel took timely objection to the denial of the motion to withdraw the plea and to the sentence.

Innes appealed to the Appellate Division, Second Department, which reversed and remanded the case to the trial court for imposition of the promised sentence or to permit withdrawal of the guilty plea. *People* v. *Innes*, 107 A.D.2d 712, 484 N.Y.S.2d 68 (2d Dep't 1985). When the People moved for reargument on the ground that the decision was inconsistent with *People* v. *DiDonato*, 100 A.D.2d 912, 474 N.Y.S.2d 957 (2d Dep't 1984), the Appellate Division granted the motion, vacated its prior decision, and affirmed the 15 to 30-year sentence. *People* v. *Innes*, 111 A.D.2d 356, 489 N.Y.S.2d 121 (2d Dep't 1985). The New York

Court of Appeals denied leave to appeal. 65 N.Y.2d 982, 494 N.Y.S.2d 1050, 484 N.E.2d 680 (1985).

Innes thereupon petitioned for habeas relief in federal district court pursuant to 28 U.S.C. § 2254 (1982). He raised two arguments: first, he contended that conditioning his sentence on not being re-arrested prior to sentencing denied him due process and the presumption of innocence, thereby entitling him to specific performance of the plea agreement; second, he argued that due process required that he be permitted to withdraw his guilty plea. The district court rejected both contentions and denied his petition for a writ, though it did grant a certificate of probable cause. 680 F.Supp. 517, 520 (1988). This appeal followed.

II. DISCUSSION

The sole issue before us is whether due process requires that this appellant be permitted to withdraw his guilty plea and stand trial on the four original counts of robbery in the first degree.

A. *Significance of Plea Agreements*

Most criminal convictions are achieved through pleas of guilty, usually made under a plea bargaining arrangement. In fact, it has been estimated that as high as 90 percent of all criminal convictions are obtained by guilty pleas. *See* A.W. Alshuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 Colum.L.Rev. 1059 n. 1 (1976). Plea agreements are obviously vital to the efficient administration of criminal justice.

Such agreements involve interests significant to the state and to the criminal defendant. They permit the state to avoid the expense and the over-burdensome demands on court personnel and facilities that formal prosecution of every case would exact. A plea-bargaining defendant obtains the opportunity to reduce or fix the exact punishment that he will receive, and avoid exposure to the greater punishment to which he might otherwise be subject.

B. *Plea as a Waiver of Constitutional Right*

A plea of guilty "is more than a confession which admits that the accused did various acts; it is itself a conviction . . . " *Boykin* v. *Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969). By entering such a plea, a defendant waives his Fifth Amendment privilege against self-incrimination. *Id.* at 243, 89 S.Ct. at 1712. Upon its entry, a defendant also simultaneously waives nearly all of the safeguards that attend prosecution in a criminal trial. A defendant waives his right to call witnesses in his own behalf, his right to confront and cross-examine his accusers, and his right to trial by jury. *See Haring* v. *Prosise*, 462 U.S. 306, 319-20, 103 S.Ct. 2368, 2376-77, 76 L.Ed.2d 595 (1983); *Henderson* v. *Morgan*, 426 U.S. 637, 644-45, 96 S.Ct. 2253, 2257-58, 49 L.Ed.2d 108 (1976). As a result, the Supreme Court has long held that a defendant's waiver of significant constitutional rights must be knowingly and intelligently made. *See Brady* v. *United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1468, 25 L.Ed.2d 747 (1970); *Mc Mann* v. *Richardson*, 397 U.S. 759, 770, 90 S. Ct. 1441, 1448, 25 L.Ed.2d 763 (1970). In *Brady*, for example, the Court held that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." 397 U.S. at 748, 90 S.Ct. at 1469. If the guilty plea is not "equally voluntary and knowing," it is inconsistent with the requirements of due process, and is therefore void. *McCarthy* v. *United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 1171, 22 L.Ed.2d 418 (1969).

The interrelationship between a plea of guilty and the waiver of rights involved was illuminated recently in *Ricketts* v. *Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 2682-86, 97 L.Ed.2d 1 (1987). *Ricketts* considered whether the Double Jeopardy Clause barred the first degree murder prosecution of a defendant, following his breach of a plea agreement under which he had pled guilty to a lesser offense, been sentenced, and begun serving his time. *Id.* 107 S.Ct. at 2682. Adamson had been arrested and charged with first degree

murder for his part in the killing of an Arizona newspaper reporter. Shortly after trial began, Adamson and the prosecution agreed that he would plead guilty to second-degree murder in exchange for his testimony implicating two other individuals, allegedly involved in the same murder. The plea agreement provided, in pertinent part, that "should the defendant refuse to testify . . . then this entire agreement is null and void *and the original charge will be automatically reinstated." Id.* (emphasis added). Adamson dutifully testified against both individuals. Following a mistrial, he refused to testify a second time, asserting that he had fulfilled the plea agreement. The State of Arizona thereupon reinstituted the original charge of first degree murder. The Supreme Court held that the plea agreement had been breached, and that defendant had specifically waived his Double Jeopardy defense by the express and easily understood terms of the plea agreement. *Id.* at 2685.

In reaching that conclusion, the majority noted that the plea agreement specified "in two separate paragraphs the consequences that would flow from [defendant's] breach of his promises." *Id.* Because "respondent unquestionably understood the meaning of these provisions," the waiver of his Double Jeopardy defense was made knowingly and intentionally. *Id.* Because of the specificity of the plea agreement regarding the consequences of the Adamson's breach, the majority could confidently find a knowing and intelligent waiver of his Fifth and Fourteenth Amendment right. *Id.* at 2685-86.

C. *Resolution of Disputes Regarding Plea Consequences*

1. *Contract Analogy*

A prosecutor's consent to a reduction of the charge set forth in the indictment is viewed as "consideration" for the exchange of the defendant's guilty plea. *See United States ex rel. Williams* v. *McMann*, 436 F.2d 103, 106 (2d Cir.1970), *cert. denied*, 402 U.S. 914, 91 S.Ct. 1396, 28 L.Ed.2d 656 (1971). When a dispute arises

later as to the consequences of a plea, some courts believe the language and usages of contract law are useful in construing the plea agreement and in ensuring that the parties obtain their anticipated bargain. *See, e.g., United States* v. *Giorgi*, 840 F.2d 1022, 1025 (1st Cir.1988), *United States* v. *Gonzalez-Sanchez*, 825 F.2d 572, 578 (1st Cir.), *cert. denied*, —U.S.—, 108 S.Ct. 510, 98 L.Ed.2d 508 (1987); *United States* v. *Calabrese*, 645 F.2d 1379, 1390 (10th Cir.), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3008, 69 L.Ed.2d 390 (1981); *United States* v. *Bridgeman*, 523 F.2d 1099, 1109-10 (D.C. Cir.1975), *cert. denied*, 425 U.S. 961, 96 S.Ct. 1743, 1744, 48 L.Ed.2d 206 (1976); *State* v. *Rivest*, 106 Wis.2d 406, 413-14, 316 N.W.2d 395, 399 (1982); *State* v. *Brockman*, 277 Md. 687, 696-97, 357 A.2d 376, 382-83 (1976). *But see People* v. *Selikoff*, 35 N.Y.2d 227, 240-41, 360 N.Y.S.2d 623, 318 N.Ed.2d 784 (1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975); *Hodes* v. *State of New York*, 113 A.D.2d 121, 122, 495 N.Y.S.2d 279 (3d Dept. 1985) (construing *Selikoff* as rejecting "the application of contract law to plea agreements" because "public policy considerations in the sentencing of criminal defendants override the ability to contract").

Comparing a criminal defendant with a merchant in the marketplace is an inappropriate analogy that we have rejected. *See United States ex rel Selikoff* v. *Commissioner of Correction*, 524 F.2d 650, 654 (2d Cir. 1975). The law of commercial contracts plays only a limited role in resolving a plea dispute. New York law reflects this limited role by requiring the preparation of a presentence report before any plea agreement may be finalized. *See* N.Y.C.P.L. § 390.20(1) (McKinney's 1983); *see also Selikoff*, 524 F.2d at 654. Plea agreements are more properly viewed as agreements between the state and the defendant; when the parties arrive at an agreement constitutionally and in conformity with state sentencing procedures, each party may insist on adherence to the bargain struck.

2. Proper Analytical Framework for Plea Resolution

Courts do not lightly indulge in a presumption of a waiver of constitutional rights. *See Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Because they implicate the waiver of fundamental rights guaranteed to persons charged with crimes, plea agreements must therefore be evaluated with reference to the requirements of due process. A defendant may not, consonant with these guarantees, be held to his negotiated plea of guilty when the promises upon which it was based remain unperformed by the prosectuion. *See Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In *Santobello* the defendant entered a guilty plea to a lesser included offense upon the prosecutor's promise to make no recommendation as to sentence. After several months of delay, the successor to the original prosecutor recommended, and the judge imposed, the maximum sentence. Noting that the prosecutor had breached the plea agreement, the Supreme Court held that "the adjudicative element inherent in accepting a plea of guilty must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262, 92 S.Ct. at 499. These safeguards include requiring the prosecution either to keep its promises or permitting the defenant to withdraw his plea. *See Id.* at 262-63, 92 S.Ct. at 498-99. The rule also applies to the rarer situation in which the defendant has breached the plea arrangement. There the relief afforded the government includes release from its promises under the plea arrangement, and the right to proceed against the defendant without reference to its earlier promises. *See Gonzalez-Sanchez*, 825 F.2d at 578.

Santobello sets forth the analytical framework for evaluation a plea agreement. First, it must be determined precisely what was provided. This step is critical in the present case. Next, it must be ascertained whether there was a material breach of the agreement. Here it is conceded that petitioner breached the agreement. Finally, it must be demonstrated that the waiver of rights

incident to the plea was the product of defendant's free and intelligent choice. *See, e.g. Ricketts* v. *Adamson*, 107 S.Ct. at 2684-86; *Santobello*, 404 U.S. at 262, 92 S.Ct. at 498. These interrelated steps are discussed separately for purposes of clarity. In the instant case, for example, the question of what the plea agreement provided is intimately related to the question of whether Innes' waiver of his rights was made knowingly and intelligently. *See Boykin*, 395 U.S. at 242-43 89 S.Ct. at 1711-12.

D. Resolution of Instant Plea Dispute

Under *Santobello's* final step it must be demonstrated that Innes's waiver of his fundamental rights was knowingly and intelligently made with an understanding of the consequences. After detailing the conditions of the agreement to Innes, the trial court then explained the potential consequences of his breach. We quote the trial court in full.

> If you violate any of the conditions outlined by the Court, do you understand that you are facing the possibility of consecutive sentence totalling thirty to sixty years which would be the maximum sentence to be imposed by you under each one of these indictments as a second or predicate felon, you would owe seven and half to fifteen—withdraw that—on the C felony, yes, it would be thirty to sixty years, you could face seven and a half to fifteen years consecutive sentence on each one of these; do you understand that?

As we view this explanation, the problem lies both in what the trial court said and in what it failed to say. It notes that Innes faced "the possibility of consecutive sentencing" and that he "could face seven and a half to fifteen years consecutive sentence." This does not straightforwardly tell the defendant that his guilty plea could not be withdrawn.

Nothing was actually said in the trial judge's admonition that were Innes rearrested he would be unable to withdraw his plea, nor was he told that his guilty plea would stand regardless of

whether he was rearrested. Most significantly, Innes was not told that were he arrested the state court could and would unilaterally impose an enhanced sentence of 15 to 30 years, rather than the four and a half to nine years discussed during the plea bargaining colloquy. Appellees interpret the court's statement to mean, "do you understand that if you breach any of the conditions, this court will sentence you?" Yet, that is not what the trial court said. It is surely an equally plausible explanation of the colloquy that Innes would—were he to breach the agreement—face trial on the four first degree robbery counts, exposing him to a 30 to 60 years sentence. The state trial court should have explained with greater clarity—the same clarity demonstrated in its allocution to Inness—the consequences of the breach. Instead, we are left to speculate on those consequences because of the ambiguity that resides in the language of the please record.

The validity of a guilty plea is impaired only when its consensual character is brought into question. *See Mabry* v. *Johnson*, 467 U.S. 504, 509, 104 S.Ct. 2543, 2547, 81 L.Ed.2d 437 (1984). In our view, Innes has raised sufficient doubt as to whether his plea was ever accepted, and even if it was, whether he was fully and "fairly apprised of its consequences." *Id.*

The provisions of the plea agreement that fix a criminal defendant's term of imprisonment are largely dictated by the state. Because of this and the substantial constitutional interests implicated by plea agreements, the state must bear the burden for any lack of clarity in the agreement and ambiguities should be resolved in favor of the defendant. *See Giorgi*, 840 F.2d at 1026 ("[T]he government must shoulder a greater degree of responsibility for lack of clarity in a plea agreement."); *United States* v. *Harvey*, 791 F.2d 294, 300 (4th Cir.1986) ("[C]onstitutional . . . concerns require holding the Government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in plea agreements."); *United States* v. *Fields*, 766 F.2d

1161, 1168 (7th Cir.1985) (government has a "duty to use special care in their drafting" of plea agreements).

In the instant case, the colloquy between the trial court and appellant unfortunately does not remove the uncertainty surrounding the consequences of Innes' breach. The waiver in *Ricketts* was by a written agreement that carefully detailed the consequences of a breach—"the parties shall be returned to the positions they were in before this agreement." 107 S.Ct. at 2685. In contrast, the present oral agreement was never memorialized in writing and was, as observed earlier, laden with ambiguity. Under this plea agreement, it cannot safely be said that Innes voluntarily, knowingly and intelligently waived his right to a jury trial. In particular, it is impossible to conclude that appellant truly understood that he was waiving his right to be tried on the original charges of first degree robbery, and agreed instead that were he rearrested the state trial court could unilaterally impose a 15 to 30 years sentence upon him.

We recognize that on this collateral attack by habeas petition, appellant has the burden to establish that he did not intelligently and knowingly waive his constitutional rights with full knowledge of the consequences. *See Johnson* v. *Zerbst*, 304 U.S. at 468-69, 58 S.Ct. at 1024-25. Under the circumstances, we are persuaded that whatever waiver appellant agreed to was without adequate knowledge of the consequences flowing from his breach of the plea agreement. In short, Innes has met his burden of proof. Hence, the state trial court's denial of Innes' request to withdraw his guilty plea and its subsequent imposition of a longer than discussed term of imprisonment deprived petitioner of due process. *Cf. Selikoff*, 524 F.2d at 653-54 (noting that trial judge's offer to permit withdrawal of guilty plea and defendant's refusal to do so cured any due process concerns). More specifically, the State of New York denied Innes his right to trial by jury on the charges made against him. In so doing, it denied him due process of law. 28 U.S.C. § 2254(d)(7).

Finally, contrary to the suggestions of the district court and appellees, Innes will not have obtained any benefit from his breach of the plea agreement. He does not gain the reduced sentence for which he attempted to bargain. Rather, because of his breach, he stands before the state court for trial.

Appellees' suggestion that this determination will permit defendants to control the plea process is unpersuasive. The state's leverage in the plea bargaining process is nearly always superior to that of a defendant. Rather, this holding should encourage greater clarity and specificity in plea negotiations and plea agreements. In that way, it will tend to ensure fairness, stabilize and finalize the parties' expectations, and reduce the waste of judicial resources required to review challenges to guilty pleas that are encouraged when the record of the plea proceedings is ambiguous.

CONCLUSION

Accordingly, the judgment of the district court is reversed and the matter remanded to it with directions that it grant Innes' application for a writ of habeas corpus.

VAN GRAAFEILAND, Circuit Judge, dissenting:

In *People* v. *Selikoff*, 41 A.D.2d 376, 379, 343 N.Y.S.2d 387 (1973), *aff'd*, 35 N.Y.2d 227, 360 N.Y.S.2d 623, 318 N.E.2d 784 (1974), *cert. denied*, 419 U.S. 1122, 95 S.Ct. 806, 42 L.Ed.2d 822 (1975), the court said:

> While many, if not most, sentence arrangements by the court at the time of a guilty plea are expressly made conditional upon the findings of the presentence report, it is clear that any such arrangement, no matter how phrased, must be considered contingent until such time as it is confirmed by the court, subsequent to its review of the presentence report, by the formal imposition of sentence.

If, as here, there is a significant change of circumstances between the plea agreement and the imposition of sentence, the

court has the option to either permit withdrawal of the plea or to enforce the sentence as conditionally promised. *People* v. *Selikoff*, *supra*, 35 N.Y.2d at 238, 360 N.Y.S.2d 623, 318 N.E.2d 784; *People* v. *Carr*, 135 A.D.2d 722, 522 N.Y.S.2d 623 (1987) (mem); *People* v. *Blackwell*, 42 A.D.2d 973, 348 N.Y.S.2d 152 (1973) (mem); *People* v. *Di Giacomo*, 40 A.D.2d 689, 336 N.Y.S.2d 260 (1972) (mem.); *People* v. *Chadwick*, 33 A.D.2d 687, 306 N.Y.S.2d 182 (1969) (mem.); see *People* v. *Santobello*, 39 A.D.2d 654, 331 N.Y.S.2d 776 (1972) (mem.). As framed by the petitioner himself, the relief he seeks is in the alternative; either the original agreed upon sentence should be imposed (Appellant's Brief Point II), or he should be permitted to withdraw his guilty plea (Point I).

Without taking any position relative to the "Discussion" in the majority opinion, I vote simply to direct the grant of the alternative relief that petition seeks.

Decision of the United States Court of Appeals for the Eastern District of New York February 4, 1988

James INNES, Petitioner,

v.

Stephen DALSHEIM, Superintendent, Downstate Correctional Facility, Robert Abrams, Attorney General of the State of New York, John Santucci, District Attorney, Queens County, Respondents.

No. 87 C 2064.

United States District Court,
E.D. New York.

Feb. 4, 1988

Petition was brought for writ of habeas corpus. The District Court, Nickerson, J., held that: (1) trial court's acceptance of guilty plea on condition that defendant not get rearrested or charged with any other crimes pending sentencing was enforceable and did not violate defendant's due process right; (2) trial court could consider information as to other crimes for which defendant was neither tried nor convinced in determining proper sentence for defendant; and (3) defendant's breach of pleas bargain agreement did not entitle defendant to be permitted to withdraw his guilty plea.

Petition denied.

James Innes, pro se.

Robert Abrams, Atty. Gen. of N.Y. (Monica R. Jacobson, Asst. Atty. Gen., of counsel), New York City, for respondents.

MEMORANDUM AND ORDER

NICKERSON, District Judge.

Petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2254.

Decision of the United States District Court for the Eastern District of New York February 4, 1988

Pursuant to a plea agreement to a total concurrent sentence of 4½ to 9 years, petitioner pled guilty on December 19, 1983 before the Supreme Court, Queens County, to four counts of robbery in the second degree. The Court accepted the plea agreement and conditioned petitioner's remaining at liberty pending sentence on, among other things, petitioner's not getting "rearrested and charged with any other crimes or offenses." The court told petitioner that if he violated any of the conditions he faced a possible 60 years.

On the sentence date the court said it had documentation from the District Court in Nassau County that petitioner had been arrested and charged with four separate robberies, three of them while he was at liberty. The court therefore ruled petitioner had breached the agreement, denied a motion to withdraw the plea, and sentenced him to 15 to 30 years. The Appellate Division reversed and remanded, *People* v. *Innes*, 107 A.D.2d 356, 484 N.Y.S.2d 68 (2d Dep't 1985), but thereafter granted reargument, vacated its prior order, and affirmed the sentence. 111 A.D.2d 356, 489 N.Y.S.2d 121 (2d Dep't 1985). The Court of Appeals denied leave to appeal.

Claiming that enforcement of the condition not to get arrested and charged with new crimes violated the due process clause, petitioner asks this court to order performance of the plea agreement or, in the alternative, to vacate the conviction.

Petitioner's chief claim is based on the premise that a sentencing court may not constitutionally attach as a condition to a plea agreement permitting a defendant to remain at large that he not get arrested and charged pending sentence. The argument is that an arrest in not within the defendant's control and that he may be arrested maliciously or without cause. Thus, petitioner urges that plea agreements such as his violate due process because a defendant might be wrongfully arrested and accused when engaging in wholly innocent behavior.

This court does not read the plea agreement to mean that an arrest under the hypothetical situation posed by petitioner would constitute a breach or that petitioner would be foreclosed from urging before sentence that he had done nothing while at liberty to justify arrest.

The language in which the sentencing court put the conditions appears in the following colloquy:

> THE COURT: Do you further understand this Court is conditioning your remaining at liberty and the pleas in this case on the following, number one, that you show up for sentence, number two, that you cooperate with probation, number three, most important, that you don't get re-arrested and charged with any other crimes or offenses; do you understand that?
>
> THE DEFENDANT: Yes.

The court then asked if petitioner understood that if he violated "any of the conditions outlined the by the Court" he faced "the possibility of consecutive sentences totalling thirty to sixty years." Petitioner responded that he did so understand.

In telling petitioner he must not "get" arrested and charged, plainly the court did not mean malicious or otherwise baseless arrests and charges. Petitioner was thus entitled at sentence to assert that the charges did not fairly stem from anything he did. *See United States* v. *Lee*, 818 F.2d 1052, 1056-57 (2d Cir. 1987). Yet he made not such claim.

The due process clause limits the circumstances under which breach of a plea agreement may be charged to a defendant. In *Ricketts* v. *Adamson*, ___U.S.___, 107 S. Ct. 2680, 2686, 97 L.Ed.2d 1 (1987), the Supreme Court said that where such a breach exposes a defendant to prosecution on a greater included offense, the prohibition against double jeopardy requires that the breach be knowing. It follows that where a breach will subject the defendant to increased punishment, due process requires some know-

ing action by the defendant. Indeed, the government by its own misconduct may not manipulate a breach by a defendant. *Cf. Oregon* v. *Kennedy*, 456 U.S. 667, 673-74, 102 S. Ct. 2083, 2088, 72 L.Ed.2d 416 (1982) (double jeopardy clause prohibits retrial after a mistrial intentionally provoked by government). *See generally* Note, Double Jeopardy, Due Process, and the Breach of Plea Agreements, 87 Column.L.Rev. 142, 157-59 & n. 100 (1987) (double jeopardy and due process may require that breach of plea agreement be knowing or reckless not fostered by governmental misconduct).

Petitioner does not suggest that he was such a victim. When the court told him that one condition of his remaining at liberty was that "you don't get re-arrested and charged with any other crimes," the court was informing him that if he engaged in behavior that led authorities to arrest and charge him with a crime, he faced a higher sentence. Had he done nothing to justify an arrest, or acted unknowingly or as a result of a ruse by the police, petitioner could have, and doubtless would have, objected at sentencing.

Why petitioner did not contend at sentence that he was unjustifiably arrested is not strictly relevant to the present proceeding. However, the records of the County Court of Nassau County show that on February 1, 1985 petitioner pled guilty to five counts of first degree robbery, four counts of attempted robbery, and one count of criminal possession of stolen property.

Petitioner also argues that the sentencing court violated his presumption of innocence by attaching consequences to arrest and charges.

The presumption of innocence is an important procedural protection. An accused on trial is presumed innocent, and the government has the burden of showing guilt beyond a reasonable doubt. *Bell* v. *Wolfish*, 441 U.S. 520, 533, 99 S.Ct. 1861, 1870, 60 L.E.d.2d 126 (1976). The presumption "also may serve as an admonishment to the jury to judge an accused's guilt or innocence

solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of the arrest, indictment, or custody, or from other matters not introduced as proof trial." *Bell* v. *Wolfish, supra*, 441 U.S. at 553, 99 S.Ct. at 1870.

But even if the presumption applies to a court's consideration of matters bearing on punishment after conviction, *compare United States* v. *Lee, supra*, at 1055-57, with *McMillian* v. *Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 2420 n. 8, 91 L.Ed.2d 67 (1986), a sentencing judge may take into account a variety of factors including "other crimes for which the defendant was neither tried nor convicted." *United States* v. *Lee, supra*, at 1055. A court may gather information as to a defendant's activities so as "to determine a proper punishment for the crime of which [defendant] then stood convicted." *United States* v. *Piteo*, 726 F.2d 53, 54 (2d Cir.) *cert denied*, 467 U.S. 1206, 104 S.Ct. 2390, 81 L.Ed.2d 348 (1984). At sentencing a defendant is, of course, entitled to require the prosecution to make some kind of showing that he did engage in acts that led to an arrest and charge. But he must at least put those acts in issue. *United States* v. *Lee, supra*, at 1056-57. Here petitioner never suggested he had not committed the robberies with which he was charged.

Finally, petitioner urges that due process requires, that he be permitted to withdraw his plea. There is no merit to this argument.

Where the government breaches a plea agreement, a defendant may choose whether to withdraw the guilty plea or to be sentenced according to the agreement. *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed2d 427 (1971). Conversely, a breach by a defendant relieves the government of its obligations under the agreement, and the defendant "return[s] to the position he occupied prior to execution of the plea bargain." *Ricketts* v. *Adamson*, —U.S.—, 107 S.Ct. 2680, 2686, 97 L.Ed.2d 1 (1987).

A reading of the above quoted statement as permitting petitioner to withdraw his plea would take the statement out of con-

text. In *Ricketts* v. *Adamson* the defendant pled guilty to second degree murder, and the prosecutor promised not to press a charge of first degree murder. The Supreme Court held that the defendant's breach relieved the government of its promise and permitted a return to the original position, thereby exposing him to prosecution for the greater offense. The Court did not suggest that a defendant could benefit from his own breach of the agreement. Indeed, it would be fatuous to allow him to do so.

The petition for a writ of habeas corpus is denied. So ordered.

Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department, May 1985

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v. JAMES INNES, Appellant.—Motion by the People for an order granting reargument of the appeal in the above-entitled case, decided by decision and order of the court, both dated January 14, 1985 (107 AD2d 712).

Motion for reargument granted and, upon reargument, the decision and order of this court, both dated January, 14, 1985, are recalled and vacated, and the following decision is substituted therefor:

Appeals by defendant, as limited by his motion, from four sentences of the Supreme Court, Queens County (Rotker, J.), each imposed February 24, 1984, the sentences being two concurrent terms of imprisonment of 7½ to 15 years, to run concurrent to two consecutive terms of imprisonment of 7½ to 15 years, upon his conviction of four counts of robbery in the second degree, after pleas of guilty.

Sentences affirmed.

The defendant pleaded guilty to robbery in the second degree under each of four indictments in return for the court's promises that he "remain at liberty pending sentence" and that he be sentenced to concurrent indeterminate terms of imprisonment of 4½ to 9 years. The court advised the defendant that its promises were subject to the following conditions, which defendant stated he understood: "number one, that you show up for sentence, number two, that you cooperate with probation, number three, most important, that you don't get rearrested and charged with any other crimes or offenses". The defendant also claimed he understood the court's admonition that: "If you violate any of the[se] conditions***you are facing the possibility of consecutive sentence [*sic*] totalling thirty to sixty years which would be the maximum sentence to be imposed by you [*sic*] under each one of these indictments as a second or predicate felon, you would owe seven and a half to fifteen—withdraw that, on the C felony, yes, it would be thirty to sixty years, you could face seven and a half to

fifteen years consecutive sentence [*sic*] on each one of these". The defendant was arrested prior to sentencing and charged with several robberies. At the sentencing in the instant matter, the court adverted to its admonition and sentenced the defendant as a second felony offender to two concurrent terms of imprisonment of 7½ to 15 years, to run concurrent to two consecutive terms of imprisonment of 7½ to 15 years. The defendant's motion to withdraw his pleas was denied.

On appeal, the defendant seeks specific performance of the sentence promises made to him at the plea hearing, viz., concurrent terms of imprisonment of 4½ to 9 years.

In *People* v. *DiDonato* (100 AD2d 912), the defendant pleaded guilty to attempted robbery in the second degree in full satisfaction of a three-count indictment. In return for the plea, Criminal Term promised to sentence the defendant, a "predicate felon", to "the minimum allowed by law, not less than two nor more than four years in State's prison." The court also permitted the defendant" [to] remain at liberty pending sentence". However, the court warned the defendant: "That during the course of your pending sentence you are not to get into any trouble by getting rearrested. If you get rearrested then the court will not feel bound to live up to this [sentence] promise that it is going to indicate on the record***[a]nd you could get up to three and a half to seven years in this case". Di Donato was rearrested and the court sentenced him to 3½ to 7 years in accordance with its admonition. On appeal, defendant argued that this court should either allow his to withdraw his plea or impose the agreed-upon sentence. This court affirmed the conviction, citing *People* v *Murello* (39 NY2d 879).

Since Di Donato (*supra*) was decided, this court has reached the same result under factually similar circumstances (*see, People* v *Bell*, 110 AD2d 902; *People* v *Davis*, 106 AD2d 657), and we perceive no reason for reaching a different result in the case at bar. We note that, in the instant case, the Judge made perfectly clear

the terms of the plea-bargain agreement, and the defendant, who had extensive prior experience in the criminal justice system, manifested his acceptance of those terms.

Accordingly, the sentences imposed should be affirmed. Mollen, P.J., Titone, Bracken, and Niehoff, JJ., concur.

Decision and Order of the Supreme Court of the State of New York, Appellate Division, Second Department January 1985

The PEOPLE, etc., Respondent,

v.

James INNES, Appellant.

MEMORANDUM BY THE COURT.

Appeals by defendant, as limited by his motion, from four sentences of the Supreme Court, Queens County, each imposed February 24, 1984, the sentences being two concurrent and two consecutive terms of imprisonment of seven and one-half to 15 years, upon his convictions of four counts of robbery in the second degree, after pleas of guilty.

Sentences reversed, on the law and as a matter of discretion in the interest of justice, and matter remitted to the Supreme Court, Queens County for further proceedings consistent herewith.

On these appeals, the defendant seeks specific enforcement of the sentence promised him upon entering his guilty pleas herein, to wit, concurrent terms of imprisonment of four and one-half to nine years. The plea minutes show clearly that Criminal Term conditioned its sentence promise on, *inter alia*, the defendant not being re-arrested prior to the imposition of sentence. However, defendant was arrested and charged with a number of additional cremes, three of which were allegedly committed subsequent to the entry of the pleas herein. At sentencing, Criminal Term noted that fact, advised defendant that he would no longer be sentenced as promised, denied defendant's counsel's application to withdraw the defendant's pleas and sentenced the defendant to consecutive terms of imprisonment of seven an one-half to 15 years on two of the convictions and concurrent terms of imprisonment of seven and one-half to 15 years on the remaining two convictions. With commendable candor, the People acknowledge that inasmuch as the promised sentences could not be fulfilled by Criminal Term, defendant should have been permitted to withdraw his pleas. Accordingly, we reverse the sentences, and remit

the matter to Criminal Term to give it the opportunity to either impose the promised sentences or permit defendant to withdraw his guilty pleas (see *Santobello* v. *New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427).